

February 24, 2022

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERROD, TEED, VANDERHAGAN and WARE,

Plaintiffs,

-v-

Case No. 17-10164

VNA and LAN,

Defendant.

/

MOTION HEARING

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

FEBRUARY 24, 2022

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(Appearances Continued on Next Page)

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February 24, 2022

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P R O C E E D I N G S

THE CLERK: Calling case 17-10164, Sherrod, Teed, Vanderhagen and Ware vs VNA and LAN.

THE COURT: Thank you. Please be seated.

MR. STERN: Good morning, Your Honor. Corey Stern and Moshe Maimon for the four plaintiffs.

THE COURT: Thank you.

MR. CHRISTIAN: Good morning, Your Honor. Marcus Christian and Mark Ter Molen on behalf of VNA.

THE COURT: Okay. Thank you, both.

And let me do this. I just want to discuss what we're -- and Mr. Mason and Mr. Kent.

MR. MASON: Good morning, Your Honor. I tried not to stand up.

THE COURT: I know, I know. And I'm used to it, too. So would you like to put your appearance on the record?

MR. MASON: I would. Thank you, Your Honor. Wayne Mason, David Kent, and Travis Gamble on behalf of LAN today.

THE COURT: Great. Thank you. Thank you. What I'd like to do today is cover the nonparty at fault issue. The Fifth Amendment issue as far as we can go with it, because we don't have a lot of information about the witnesses who might assert it.

A discussion about client representatives at counsel table that Mr. Mason had raised at sidebar yesterday. I'm

1 also interested in just getting an update on where you are
2 with making -- sorting out the objections in the deposition
3 transcripts for those witnesses who will appear by video
4 deposition.

5 And then I'd just like to know so that I can be
6 prepared who will be doing the openings and whether you have
7 any closer estimate of the timeframes just so that we can stay
8 on schedule on Monday.

9 So why don't we start with the nonparty at fault
10 issue. Are there other issues we should talk about?

11 MR. MAIMON: I don't think there are, Your Honor.
12 This is Moshe Maimon for the plaintiffs. Although I did
13 advise Mr. Mason this morning that we are withdrawing our
14 objection to Mr. Green being present during openings and the
15 first witnesses until he testifies.

16 So we don't have to cover that.

17 THE COURT: Okay. Because I think Rule 615b covers
18 it. Good.

19 MR. MAIMON: Just if I can just update the Court on
20 the deposition issue.

21 THE COURT: Please.

22 MR. MAIMON: We should be submitting -- we met and
23 conferred with counsel for both VNA and LAN with regard to the
24 next, I think, three depositions that we were going to submit.
25 Those should be submitted to the Court today with regard to

1 Mr. Gadis, Mr. Nicholas, and Mr. Gnagy, all VNA deponents and
2 those revised depositions with objections, hopefully seriously
3 decreased, should be submitted to the Court today.

4 THE COURT: Okay. And when do you anticipate them
5 testifying so that I can schedule it?

6 MR. MAIMON: I don't think they'll -- they certainly
7 won't testify -- we certainly will not offer their testimony
8 during the first two weeks of trial of evidence.

9 THE COURT: Okay. Good.

10 So here's what would be very helpful -- okay. So you
11 just told me -- let me write down who you just told me. You
12 said Mr. Gadis.

13 MR. MAIMON: Gadis, Nicholas, and Gnagy or Gnagy.

14 THE COURT: Yeah.

15 MR. TER MOLEN: Gnagy.

16 THE COURT: I've been saying Gnagy.

17 MR. TER MOLEN: It's kind of a J sound to start, Your
18 Honor. Gnagy.

19 THE COURT: Oh, goodness. I didn't have it right.
20 And this is generally the order I should take them
21 in?

22 MR. MAIMON: I believe so.

23 THE COURT: Okay. More or less. I'm not going to
24 hold you to it.

25 Okay. Well, anything else?

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1 MR. MAIMON: No.

2 THE COURT: Great. Then turning to the question of
3 the nonparty at fault, we had some informal, discussion,
4 conversation about it yesterday.

5 Is that you, Mr. Ter Molen, over here?

6 MR. TER MOLEN: Yes, Your Honor, yes.

7 THE COURT: Okay. And Mr. Maimon. Okay. And
8 Mr. Mason, Mr. Kent.

9 MR. MASON: Gamble.

10 THE COURT: Mr. Gamble. Okay. Yesterday when we
11 were talking about it, it caused me to sort of try to take a
12 step back, figure out why are we discussing this.

13 And the first step in this process is that VNA and
14 LAN, at some point in the last three years or so, filed a very
15 lengthy list of nonparties at fault. Michigan is a state that
16 permits a defendant in the course of a trial to show that what
17 -- first of all, to defend themselves, of course.

18 But to also show to the jury, prove through evidence
19 to the jury, that other parties are at fault for the conduct
20 they're accused of engaging in. And for the jury then to make
21 that decision in the course of their deliberations.

22 And after the nonparty at fault filings were made,
23 there was no filing motion to strike. That's fine. You're
24 never obligated -- if a complaint is filed, you're never
25 obligated to file a motion to dismiss.

1 There may not be a legal basis. There may not be --
2 for any number of reasons, it's your reason alone. It's not
3 for me to question why you didn't file a motion to strike the
4 nonparty at fault filing or a portion of it.

5 But that doesn't mean that at the conclusion of the
6 proofs, plaintiffs can still appeal to the Court for -- with a
7 motion for a directed verdict.

8 Because we took Dougherty Johnson as an example in
9 our informal discussion. So I'll just continue with that
10 informal example. If Mr. Johnson ultimately did not
11 participate in an undertaking related to Flint water, well
12 then at the close of the proofs, plaintiffs can say to the
13 Court -- not to the jury because it's a as a matter of law --
14 Dougherty Johnson must be removed as a nonparty at fault.

15 We're seeking a directed verdict on that. We're
16 seeking a ruling that there is -- that defendants have not
17 shown that he had a duty.

18 But aside from that, if each of the individuals that
19 the defendants seek to -- let me just -- show are actually
20 nonparties at fault, if they do meet the basic criteria in the
21 State of Michigan for having a duty, which we know is
22 relatively broad or we wouldn't be here in this trial at all,
23 then they can proceed to the jury on that.

24 So I guess I'm turning to you, Mr. Maimon, to tell me
25 why am I wrong on that?

1 MR. MAIMON: So I don't believe that Your Honor is
2 wrong at all. Because it is the Court that determines whether
3 there is a duty and what that duty is. Those are legal
4 determinations that the Court makes.

5 However, the law is clear that a party making a claim
6 must prove duty before the issue of fault or proximate cause
7 can be considered in the State of Michigan. That's the Romain
8 case --

9 THE COURT: Right.

10 MR. MAIMON: -- which had overruled prior splits in
11 Michigan courts as to whether or not that burden falls on the
12 party asserting the claim.

13 So it is the defendant's burden to prove duty.

14 THE COURT: They'll have to do that in the course of
15 their proofs. They'll have to show me -- I'll be -- I mean,
16 this is a jury trial. But that portion will be a legal issue
17 for the Court to decide.

18 MR. MAIMON: Right. And --

19 THE COURT: And what I determined, as I think we were
20 all talking past each other both in the letter briefs and in
21 our discussion yesterday.

22 So you agree it's an issue for the Court that
23 defendants have to show to the Court in the course of the --
24 oops, let me turn my -- in the course of the trial.

25 MR. MAIMON: Yes. And I would just say that it's --

1 there's one more thing that the defendants have to prove to
2 the Court's satisfaction that the prerequisites for the
3 existence of a duty is present just like we had to do that
4 with regard to both VNA and LAN.

5 THE COURT: Okay.

6 MR. MAIMON: The Court then determines, number one,
7 whether there is a duty. But the Court also determines what
8 that duty is. Because the duty for one entity or person or
9 whatever might be different than what it is for another.

10 THE COURT: So give me an example of --

11 MR. MAIMON: So, for instance, if I -- if I get into
12 an accident and I sue Mr. Stern because he knocked me over,
13 and I go to the hospital and a doctor makes things worse, my
14 claim against Mr. Stern is for negligence.

15 THE COURT: Okay.

16 MR. MAIMON: My claim against the doctor is for
17 profession -- is for medical malpractice. And there are
18 different duties that are implicated when you're a
19 professional as opposed to when you're a regular citizen who
20 is negligent and so forth.

21 So my point is that for instance, in this -- in the
22 Flint Water Cases proceedings, the courts have been very clear
23 with regard to potential liability by governmental -- by state
24 and city governmental entities and persons with regard to what
25 is the theory of liability against them. Because your duty is

1 based on the theory of liability.

2 THE COURT: Isn't the duty to take reasonable care to
3 avoid foreseeable physical harm in an undertaking unless
4 there's an additional statutory duty that somebody might have?

5 MR. MAIMON: Right. But for instance, with regard to
6 VNA and LAN, it was our burden to show that they had a duty as
7 professional engineers.

8 THE COURT: Correct.

9 MR. MAIMON: And the Court ruled on that.

10 With regard to the state and city individuals, the
11 courts have already set forth that the theory of liability is
12 a Fourteenth Amendment liability issue. And that carries with
13 it its own measures of proof. It might not impact the duty to
14 exercise reasonable care. But the degree that both Your Honor
15 and other judges who have addressed it and I think the Sixth
16 Circuit --

17 THE COURT: The Sixth Circuit certainly found that
18 the motion to dismiss was properly denied regarding whether
19 plaintiffs had alleged -- made out an allegation of a
20 violation of their right to bodily integrity --

21 MR. MAIMON: Right.

22 THE COURT: -- requiring deliberate indifference and
23 all sorts of things.

24 But I don't think the defendants are bound to that
25 duty in this instance. I -- what I understand them to be

1 saying is it's the duty to take reasonable care to avoid
2 foreseeable physical harm in an undertaking.

3 They're not bound by the various different
4 allegations or theories that plaintiffs alleged in their
5 complaint. This is their case of nonparty at fault. They can
6 fashion it and develop it the way they think it's legally
7 appropriate.

8 MR. MAIMON: Except it has to -- so for instance, in
9 my accident medical malpractice claim, assume for the moment
10 that the doctor had settled and Mr. Stern wants to assert a
11 nonparty at fault, which is very similar to our circumstance
12 here.

13 He would have to prove that the doctor committed
14 malpractice because the duty of the doctors --

15 THE COURT: Yes.

16 MR. MAIMON: -- is the malpractice. And so we
17 believe that --

18 THE COURT: But let me just interrupt you.

19 He wouldn't have to prove that you engaged in medical
20 malpractice by bumping into him. He'd have a different theory
21 of your duty. Just like --

22 MR. MAIMON: Well, I sued him, because I'm --

23 THE COURT: Oh, you're suing him. You would not have
24 to --

25 MR. MAIMON: It's for him to assert a nonparty at

1 fault claim against the doctor who settled --

2 THE COURT: Yes.

3 MR. MAIMON: -- which is the same as VNA and LAN
4 asserting against everyone who's properly on a verdict form.

5 THE COURT: And so he's not bound by the duty you're
6 claiming that he's -- that he's claiming that you had. He's
7 got a theory against the doctor, and there's a theory about
8 negligence on this -- the road or however you all --

9 MR. MAIMON: Correct. For Mr. Stern to successfully
10 prosecute a nonparty at fault claim against the doctor, he
11 basically stands in the plaintiffs' shoes and says, "The
12 doctor, the nonparty is actually liable here. He's at fault.
13 Here was his duty. Here was his breach. Here is the
14 proximate cause."

15 And so he -- the defendant in that circumstance
16 stands in the shoes of the plaintiff. I don't think we have
17 to cover this now.

18 THE COURT: Okay.

19 MR. MAIMON: Because I do believe that the
20 prerequisites are exactly as Your Honor indicated, that the
21 Court at the appropriate time will determine, A, whether there
22 is a duty. And will then say what that duty is. The same way
23 that the Court did it pretrial with regard to both LAN and
24 VNA.

25 THE COURT: Correct. And the thing that I need to

1 correct from our informal discussion yesterday is that I think
2 yesterday I was thinking that somehow a ruling was required
3 before we start trial. The ruling can't -- there is no ruling
4 because there's no motion.

5 You simply, Mr. Ter Molen and Mr. Gamble, filed these
6 notices of nonparty at fault some three years ago. They
7 stand. There's a notice. It's part of your case.

8 At the close of the proofs, plaintiffs can move to
9 say you failed to show that one or more of these people were
10 involved in an undertaking such that there would be a duty of
11 reasonable care to avoid physical harm -- foreseeable physical
12 harm.

13 Anything that I have wrong about that, Mr. Ter Molen?

14 MR. TER MOLEN: Your Honor, I think you've stated the
15 duty quite accurately, and we agree with that. I think some
16 of the comments that we heard, if I heard them correctly,
17 highlight the importance of having this discussion now.

18 THE COURT: Sure.

19 MR. TER MOLEN: Because on the defense side, we don't
20 want to be caught, obviously, in a trick bag at the end of the
21 case where plaintiffs all of a sudden come in and says.
22 "Well, no. You've had to show X, Y, Z. You know you had to
23 show the elements of a 1983 claim, for example, to establish
24 duty."

25 I think Your Honor has articulated that, in fact,

1 that's not the case and that our obligations to establish duty
2 are much -- we're looking at a broader standard of negligence.

3 And with that understanding, Your Honor, I think that
4 we're okay proceeding here.

5 THE COURT: Okay. Let me turn to Mr. Gamble.

6 MR. GAMBLE: No, we agree with Mr. Ter Molen in his
7 assessment.

8 THE COURT: Okay.

9 MR. MAIMON: So we believe, Your Honor, that the
10 Court first articulated it correctly. That it is -- the issue
11 is not ripe in front of the Court right now.

12 THE COURT: Right.

13 MR. MAIMON: And so all I was saying is we believe
14 that the time to raise this issue is really at the close of
15 evidence, because that's when the defendants will finish
16 putting on their proofs with regard to this.

17 And at that point, the Court can determine with
18 regard to anybody who is on the list submitted by -- so for
19 instance, VNA submitted its list on February 11, 2022. And
20 that's the list that we're operating under whether -- and to
21 what extent any of those persons or entities had a duty.

22 We may make arguments at that time with regard to
23 whether or not, for instance, you could have a duty on behalf
24 of the EPA as well as a person at the EPA. Whether or not
25 that duty is the agency's duty, the person's duty, what have

1 you.

2 I don't want to -- we don't -- I don't believe it's
3 incumbent upon us at this point to move against those types of
4 things as the Court found. But we also don't waive them by
5 not raising them now.

6 THE COURT: Well, if they asserted in their nonparty
7 at fault a certain theory of liability and you think that
8 theory, as a matter of law, is improper because the EPA acts
9 as a governmental entity and it does not act through human
10 beings, I don't understand that theory. But let's say that's
11 your theory.

12 Wouldn't you have had to say the method in which --
13 the type of duty they have defined is improper as a matter of
14 law? Is it --

15 MR. MAIMON: When that issue becomes ripe in front of
16 the Court, we'll make the argument if they still, for
17 instance, is it possible under the law that -- the EPA has a
18 duty, right?

19 THE COURT: Yeah, yes.

20 MR. MAIMON: Is it also possible that Ms. Hedman,
21 who's the person who they list also under the EPA heading has
22 an independent duty that can be asserted? We're going to look
23 into that.

24 We shouldn't have to say now -- and I think that's
25 what the Court said when it came out on to the bench , that

1 the issue is not ripe as to whether or not the defendants'
2 assertion of duties on behalf of both the agency and an
3 individual within the agency --

4 THE COURT: I think under Michigan law, the
5 individual has the duty if they are engaged in the undertaking
6 that could foreseeably cause physical harm.

7 MR. MAIMON: It could be.

8 THE COURT: But we don't know if she's -- you know,
9 perhaps you're going to say Hedman never touched this thing,
10 and then factually they can't make it out. But we've got to
11 all understand what the theory is that was put in all those
12 nonparty at fault notices.

13 MR. MAIMON: And the defendants filed once upon a
14 time, and I have it in front of me. And I have VNA's. I
15 think it was December 23, 2020, they filed a 231-page notice
16 of nonparty fault wherein they listed all the nonparties who
17 they believed were at fault and pursuant to the rules set
18 forth the basis for their theory of the liability and the
19 basis of fault in there.

20 And we have that. We now have the revised list of
21 February 11, 2022, reducing that to 36 either persons or
22 entities, parties, whatever you want to call them.

23 THE COURT: Nonparties.

24 MR. MAIMON: Nonparties. And all I'm saying is when
25 we get to that point after -- after the close of evidence, we

1 -- the plaintiffs will avail ourselves of our rights to
2 challenge whether there was a duty by any of -- whether there
3 was a duty by any of them or some of them or all of them.

4 And we'll make argument to the Court as to what that
5 duty might be. But the Court will determine both. I'm sorry.

6 THE COURT: The problem I'm having with this is it's
7 cart before the horse or some conceptional problem about how
8 the litigation proceeds.

9 If when you saw that 231-page nonparty at fault
10 notice, you knew then as a matter of law, 200 pages of this
11 needs to be shredded. There is no legal duty. Hedman
12 couldn't possibly -- there is no body of law that could hold
13 her liable as an individual.

14 Then I think it's incumbent upon you to bring that to
15 the attention of the Court, because otherwise we're having a
16 trial for no reason at all. I mean, we're going to have two
17 months of a -- or three months of a five-month trial just for
18 you to raise the motion you could have raised within 30 days
19 or whatever the rule would be of getting that motion.

20 You're saying as a matter of law there's no way LAN
21 and VNA can make out this legal argument. There's like no set
22 of facts could bring Hedman into this.

23 MR. MAIMON: So I'm not sure whether or not it's that
24 extreme, which is part of the reason why you wait and see what
25 the evidence is and see what the record is. But the

1 defendants could have waited -- they could have waited and not
2 filed for summary judgment, let us go through the plaintiffs'
3 case at trial and then move for a directed verdict and said,
4 "Your Honor, we do not believe" -- as they did in summary
5 judgment -- "that we have duties to the plaintiffs. We might
6 have had duties under the contract to the City of Flint, but
7 as they argued in summary judgment, we don't have duties to
8 the plaintiffs." They could have waited --

9 THE COURT: They could have --

10 MR. MAIMON: -- and let us try the case.

11 THE COURT: Here's what they've done.

12 They said at the motion to dismiss stage, "We don't
13 have a duty." And I said, "Yes, you do." Then they said at
14 the summary judgment, which I expected the briefing would be
15 on breach, causation, and damages, they said, "duty, breach,
16 causation and damages."

17 So I said, "See earlier ruling. Duty is" -- you know
18 we had some areas where duty had not been -- well, I wasn't
19 aware of the various theories. And so they're preserving
20 their duty -- they're preserving that forever. They're never
21 going to let go of it, which is fine. That's the way
22 litigation is.

23 But the fact is if all they had said -- I mean,
24 you're not obligated to file a motion for summary judgment if
25 you think there's a fact question. But that you have a

1 feeling that once that evidence comes in at trial, it's not
2 going to come in the way plaintiffs thinks it's going to, or
3 some of the deposition testimony is likely to come out
4 differently. I don't know. You certainly can go to trial and
5 do that.

6 But if all you're doing at the end of plaintiffs'
7 proof is going back and saying, "duty," and the very same
8 argument that was decided already, you're just going to be
9 shot down for that.

10 MR. MAIMON: I understand that. But the defendants
11 didn't have to file a motion to dismiss. They would not have
12 waived that argument. Had they never filed a motion to
13 dismiss, never filed a motion for summary judgment, gone to
14 the close of plaintiffs' proofs, they still could have told
15 Your Honor, "We don't believe that we have a duty," and the
16 court would have --

17 THE COURT: But there -- I'm assuming that there it
18 would be fact based. Okay, now, "Your Honor, you have seen
19 and the jury has been told that Dougherty Johnson was in
20 Montana throughout this entire time, and the facts don't show
21 that he was involved in an undertaking."

22 MR. MAIMON: I just don't believe that a defendant --
23 I wish it were so. I don't believe a defendant has an
24 obligation to move either at the motion to dismiss phase or at
25 the summary judgment phase to retain its rights to argue that

1 there is no duty.

2 THE COURT: Well, here's what we'll do. I mean,
3 you're at the close, and I'm -- I'm just suggesting that if
4 they notified you that the duty that they are trying to pin on
5 all of the nonparties is to avoid foreseeable physical harm in
6 an undertaking, and you never said, "Oh, no, that's not the
7 duty. The duty is to not engage in deliberate indifference,"
8 that's an interesting -- is that the --

9 MR. MAIMON: Well, we're saying two things. So let
10 me take it an extreme example.

11 The original non-listed the by VNA listed the Genesee
12 Power Station limited partnership as a potential nonparty at
13 fault.

14 THE COURT: Let's take an example of somebody who
15 we're actually -- who's actually in the case.

16 MR. MAIMON: I was taking the extreme example, Your
17 Honor --

18 THE COURT: Okay. Just for the --

19 MR. MAIMON: -- because we do not believe at that
20 point in time that the Genesee Power limited partnership and
21 specifically with the description by LAN -- I'm sorry -- VNA,
22 about what they believe they did wrong, gives rise to a duty.

23 We just don't believe that the Genesee Power Station
24 limited partnership had a duty to our clients. We just don't
25 believe it.

1 But it was not incumbent upon us to move to strike
2 that element of the defendant's notice. To the extent they
3 wanted to try to implicate the Genesee Power Station limited
4 partnership at trial, they could have --

5 THE COURT: They would have to do it through factual
6 material coming in that says that this limited partnership...

7 MR. MAIMON: Now, they've thought better of it,
8 because it's not on the -- when the Court asked, okay, tell me
9 who you're really asserting nonparty fault against, it's not
10 there.

11 But I don't believe that it was incumbent upon the
12 plaintiffs at that point in time to go one by one out of 231
13 pages and say, "This one we believe that there can be a duty.
14 This one we believe there can't be a duty. This one, your
15 assertions with regard to it, we don't believe rises to the
16 level of establishing a duty. This one we think is a question
17 of fact."

18 That wasn't incumbent upon us at that time, and it's
19 not incumbent, I would respectfully assert, until they make
20 their case at trial.

21 THE COURT: Okay. And so what we'll do is we'll wait
22 until the close of proofs. But, I mean, there is a little bit
23 of a moving target problem here, which is that we -- I believe
24 that the duty that I'll be looking for, because it will be a
25 matter of law, is the one I've articulated repeatedly this

1 morning.

2 I'm not thinking that the duty I'm looking for is
3 deliberate indifference.

4 MR. MAIMON: Well, I don't think -- I don't think
5 it's a different duty. I think it might be that it's a
6 different standard of care. So, for instance, the defendants
7 have the duty to act reasonably here, exercise reasonable
8 care.

9 The standard of care for -- that's why I gave the
10 medical malpractice example.

11 THE COURT: Right.

12 MR. MAIMON: The standard of care for an auto driver
13 is different than the standard of care for a doctor.

14 THE COURT: Correct.

15 MR. MAIMON: Both have to exercise reasonable care.

16 THE COURT: And that's why at the beginning of this I
17 said, "Unless there's a statute or other requirement that
18 would change the standard of care from that general basic
19 Michigan standard of care."

20 MR. MAIMON: Right. But I think standard of care is
21 different than the duty.

22 THE COURT: Okay.

23 MR. MAIMON: So I have an obligation to exercise
24 reasonable care. But that reasonable care --

25 THE COURT: How we --

1 MR. MAIMON: -- subject to different standards,
2 depending on who and what we are.

3 THE COURT: Okay.

4 MR. MAIMON: That's all I'm saying. But, again,
5 that's why I said at an appropriate time, the Court can --
6 will determine, A, whether there was a duty; B, and what that
7 duty is, and what are the elements that any party has to
8 prove. And that's all I'm saying.

9 I do believe that it's different, depending on --
10 it's different for the EPA than it is for the Genesee Power
11 Station limited partnership. Because the EPA, it's -- by
12 their own regulations, establishes what their duty is.

13 THE COURT: Okay. Well, then that's a statutory
14 definition of "duty" that fits exactly with what I'm --

15 MR. MAIMON: And I agree with that. I think that at
16 that point in time, it's not a one size -- all I'm saying is
17 it's not a one-size-fits-all.

18 And, four, I mean, thank goodness we're down to 36.
19 And we'll see what they actually, you know, try and do at
20 trial. Maybe it will be less.

21 But all I'm saying is we believe we're entitled to
22 reserve our rights to challenge whether there's a duty to any
23 of them.

24 Some of them, we're going to agree, because we
25 believe that as officers of the Court, we must concede that

1 there is a duty.

2 THE COURT: Okay.

3 MR. MAIMON: But all we were saying in our letter and
4 all I'm trying to articulate is that we don't believe that we
5 have to stake that position out now.

6 THE COURT: So let me turn to Mr. Mason.

7 MR. MASON: Your Honor, I just had a practical
8 question about this. I'm not trying to infringe on Mr. Gamble
9 in his substantive argument.

10 But as a practical matter, where does this leave us?
11 Because Your Honor said in chambers yesterday there's the
12 obvious duty, let's take the governor, that the constitutional
13 requirement and the employees all.

14 And so we don't want to take up the jury's time. I
15 mean, right now as counsel in this case, do I have to pull out
16 the constitution with every witness and we're going to have to
17 go through that?

18 It's not a judicial economy issue when, for instance,
19 counsel just admitted, "Okay, the MDEQ is an obvious one."
20 And so --

21 MR. MAIMON: I didn't mention the MDEQ.

22 MR. MASON: I'm sorry. Was it EPA?

23 THE COURT: I --

24 MR. MAIMON: Yeah.

25 MR. MASON: Okay. I apologize.

1 MR. MAIMON: No problem.

2 MR. MASON: But the point is I'm just trying to say
3 to the extent that we leave this open, we're -- it just seems
4 like a futile amount of time to keep the jury involved if
5 counsel can --

6 THE COURT: I think you're going to -- if you --
7 let's take the governor.

8 If you've got the governor on the witness stand,
9 you're going to have to tell the jury and me what are his
10 responsibilities, where do they derive from, how did he fail
11 to take reasonable care in the exercise of his required
12 duties.

13 MR. MASON: Okay.

14 MR. MAIMON: And Your Honor --

15 THE COURT: I don't think that will take all that
16 much time.

17 MR. MASON: It's a lot of witnesses.

18 MR. MAIMON: I think the governor is a perfect
19 example. The governor is a perfect example, Your Honor.

20 I don't know, and I don't think that I have to assert
21 right now whether or not there are separate duties for, A, the
22 governor's office and; B, the governor. Because they've
23 asserted against both.

24 And all I'm saying is we shouldn't be put to the
25 burden now of saying, "You've proven against the governor, but

1 not the governor's office or the duty" --

2 THE COURT: I'm not asking you to. At the directed
3 verdict stage.

4 MR. MAIMON: Right. So all I'm doing is I'm looking
5 at VNA's list, and they list in their list of nonparties at
6 fault, number four, governor's office.

7 Now, I don't know whether or not we're going to agree
8 that the quote/unquote governor's office has a cognizable duty
9 here. We may agree that Governor Snyder did.

10 THE COURT: Okay. Then you won't file a directed
11 verdict on that; you'll file it on his office.

12 MR. MAIMON: Correct.

13 THE COURT: Yeah, that's what I'm anticipating.

14 MR. MAIMON: Thank you.

15 THE COURT: Mr. Ter Molen.

16 MR. TER MOLEN: Thank you, Your Honor.

17 And I am hearing potentially a fundamental
18 disagreement here about what the Michigan nonparty at fault
19 scheme means and what -- as a legal matter, what the burden is
20 on the defendants here for what we have to show.

21 I thought Your Honor articulated well at the outset
22 what the standard is here. And as Your Honor is well aware
23 and as has been in our briefing, under Michigan law, statutory
24 bars or immunities, etcetera, that apply to the plaintiff's
25 case against the government, for example, don't apply here,

1 don't apply to the nonparty at fault.

2 THE COURT: I haven't heard that argued.

3 MR. TER MOLEN: Okay. And what I am hearing, Your
4 Honor -- and, again, I may not be hearing correctly -- but
5 what I think I'm hearing is an argument that as a legal
6 matter, there are different standards that may come into play
7 for different nonparties.

8 THE COURT: If there's a statutory duty such as a
9 professional engineer or a medical doctor, then we would look
10 at what their standard of care would be as opposed to just
11 reasonable care and the undertaking to avoid foreseeable
12 physical harm.

13 MR. TER MOLEN: And, Your Honor, that may be the case
14 under the nonparty at fault process, but if plaintiffs think
15 that that's the case for any of the nonparties that we've
16 identified, we'd request -- and I think Your Honor in the
17 Court's email, February 12, after we made our submission,
18 asked plaintiffs to do this, we'd request that they identify
19 where, for which parties, for which individuals, we haven't
20 identified a legal duty.

21 So that we're all clear on the rules of the game
22 basically going into trial, we all understand, "Okay. These
23 are the elements you have to establish."

24 THE COURT: But at a minimum, they have a common law
25 duty. They may have an elevated duty. But at the minimum,

1 they have the common law duty to avoid -- to undertake things
2 with reasonable care to avoid foreseeable physical harm.

3 So as long as you meet that, that's the minimum
4 standard of care. There are some individuals who have an
5 elevated standard of care.

6 MR. TER MOLEN: And, Your Honor, I would just request
7 if plaintiffs could identify for us who those individuals are.
8 Because sitting here today, in all honesty, I don't know of
9 that --

10 THE COURT: Who --

11 MR. TER MOLEN: Who they allege have some elevated
12 standard of care.

13 That would be important for us to understand, Your
14 Honor, so that we know what the road map is that we have to
15 meet.

16 THE COURT: But you're -- if you think you can meet
17 that basic standard of care, you're good to go.

18 MR. TER MOLEN: Okay. I may have misheard Your
19 Honor. I thought Your Honor mentioned that --

20 THE COURT: Right.

21 MR. TER MOLEN: -- for some, there might be an
22 additional --

23 THE COURT: An additional burden to live up to the
24 standard of care for a doctor in this profession with that
25 license and so on.

1 But at a minimum, there's reasonable care in an
2 undertaking to avoid foreseeable physical harm.

3 MR. MAIMON: So, for instance, Your Honor, the last
4 one on their list is Rowe Professional Services. Rowe is an
5 engineering company. And so the duties, if they establish on
6 Rowe, will be the same duties that they had.

7 Because the Court has already defined that you have
8 to act as a reasonable professional would -- professional
9 engineer would under the circumstances.

10 That's possible that that's very different than
11 Mayor Walling.

12 THE COURT: See, my -- I had understood Michigan's
13 regime to say that there may be a statutory duty that's
14 elevated. That's a higher burden. But at a minimum -- or
15 that requires more proofs.

16 But as a minimum, we all, once we're engaged in an
17 undertaking, have to avoid foreseeable risk of physical harm.

18 MR. MAIMON: I don't know that we're saying something
19 different. All I'm saying is that for a professional
20 engineer, in order for the Court to determine that there's a
21 duty, we have to prove certain things.

22 With all due respect to my colleagues, it's not our
23 job to tell them what they have to prove. We don't have to
24 tell them, you know, what we think they have to prove or what
25 we believe the necessary proofs will be.

1 If they don't -- if they don't meet them to the
2 Court's satisfaction at the end, we shouldn't -- it's not a
3 legitimate argument in our view to say that the plaintiffs had
4 an obligation up front to tell them that they should've put in
5 certain proofs that they didn't.

6 THE COURT: Okay.

7 MR. MAIMON: The same way that if we don't make out
8 our case at the end of evidence and they move to dismiss, it's
9 not up to the defendants to say, "Oh, but you needed to prove
10 that," and we complain, "Well, you never told us so."

11 THE COURT: That won't happen. Because we know in
12 Michigan, every person has a duty to take reasonable care in
13 their undertakings to avoid foreseeable physical harm. That's
14 the standard they'll be held to.

15 MR. MAIMON: And all I'm saying is that the standard
16 of care for -- the Court has already defined what the standard
17 of care is for a professional engineer. And if the Court
18 determines that they've proven that Rowe Professional Services
19 had a duty, we would expect that that would be the standard of
20 care for Rowe the same way it was for these engineers.

21 It can't be a lower standard of care for an engineer
22 when it's a nonparty than it is for a professional engineer
23 when it's a defendant.

24 How is that possible?

25 THE COURT: That may be the way Michigan has set it

1 up. But Mr. Ter Molen or --

2 MR. MAIMON: We don't believe that's the way Michigan
3 has set it up, but we'll -- again, we don't believe this is
4 the time to deal with it.

5 THE COURT: Well, this would be a good time to deal
6 with it, because we -- they have to get their witnesses in
7 here to show the standard of care then.

8 So my understanding from reading these cases is that
9 it simply is there's someone else responsible for these
10 injuries under this basic Michigan duty of reasonable care and
11 undertakings concept.

12 MR. TER MOLEN: Right, Your Honor.

13 MR. MAIMON: So we believe -- we believe that it is
14 different depending on -- because what is reasonable for a
15 professional engineer might not be what is reasonable and
16 expected for a common person. And so --

17 THE COURT: The duty is one thing. But to show
18 breach, you're going to have to show what a professional
19 engineer would have done for breach. What would -- what would
20 a -- how would a professional engineer have met this
21 reasonable --

22 MR. MAIMON: I don't think we're saying anything
23 different.

24 THE COURT: Mr. Ter Molen.

25 MR. TER MOLEN: Thank you, Your Honor.

1 I think Your Honor has articulated that under the
2 Michigan Nonparty At Fault Act, there is. And this is
3 certainly in our view, there's basically one-size-fits-all,
4 right?

5 I mean, for all the different entities -- for
6 purposes of Nonparty At Fault Act, it's different than what
7 plaintiffs have to establish, as we've talked already, it's a
8 one-size-fits-all.

9 And I would just suggest, Your Honor, that to pick up
10 the process that the Court had directed in its February 12
11 email here, if plaintiffs have a different view of what the
12 law requires here as Your Honor suggested, this is a perfect
13 time to brief that so that we're all clear on it. I think
14 that would be a very helpful process.

15 MR. MAIMON: I just don't see, Your Honor, how --
16 imagine there was never anybody else in this case and nobody
17 else at fault. Just two engineering companies. I cannot
18 understand why we have a claim against both of these
19 companies. The duty is the same. The standard of care is the
20 same.

21 I do not believe that Michigan law mandates that if
22 one of them settled out, that the remaining defendant could
23 say, "Oh, we don't have to prove professional negligence
24 against the settling party. We have a lower duty to show to
25 assign fault that the plaintiff had a minute ago."

1 THE COURT: It's still the duty -- I hear what you're
2 saying. The duty is still a duty as a professional engineer.

3 MR. MAIMON: We agree.

4 THE COURT: So if it was a doctor who did improper
5 surgery, it would still be what would a doctor who is engaged
6 in the correct standard of care taking reasonable care have
7 done.

8 MR. MAIMON: Exactly. And that's the definition of
9 what the duty is.

10 THE COURT: Okay.

11 MR. MAIMON: That's all we're saying.

12 THE COURT: So --

13 MR. TER MOLEN: But, again, Your Honor, respectfully
14 the statutory scheme, I think the Nonparty At Fault Act has
15 made it clear that they were basically abrogating the
16 statutory scheme in a number of respects, including with
17 respect to --

18 THE COURT: Who is abrogating the statutory scheme?

19 MR. TER MOLEN: The nonparty at fault regime, that
20 whole -- the nonparty at fault process, Your Honor. It was
21 specifically set up so that statutes that provided immunity,
22 for example, the governmental entities would not apply. And
23 so to the extent that plaintiffs are asserting now that, well,
24 you know, there are some rules that should apply like a
25 standard of professional negligence, then I'd respectfully

1 suggest that we review and brief that question.

2 Since, frankly, one of our purposes in raising this
3 issue was exactly to highlight where -- what's coming down the
4 pike, what the standards are. And this would be a fine
5 opportunity just to brief that issue, so we're all clear.

6 MR. MAIMON: Your Honor --

7 THE COURT: But you understand, Mr. Maimon, that the
8 immunities don't apply.

9 MR. MAIMON: Of course we understand that, and that's
10 explicit. But fine opportunities don't infringe upon our
11 rights to assert our claims and our defenses at an appropriate
12 time.

13 So counsel for VNA may want us to say what we believe
14 the standard of care is now. But we believe that --

15 THE COURT: Here's where I think we are. It's the
16 word "reasonable." So -- what this has all come down to.

17 So what's reasonable for a governor is not going to
18 be what's reasonable for somebody walking down the street who
19 gets involved in helping Flint Water Treatment Plant.

20 There's going to be -- you are going to have to show
21 that the governor with his power -- powers and authority and
22 charge in the constitution did not live up to that as a
23 governor should.

24 You're not going to hold -- the governor can't be
25 held to the standard of an engineer. An engineer can't be

1 held to be able to do what the governor can do at his level
2 and with his resources and knowledge and constitutional
3 authority.

4 So I think what we've come down to is a discussion of
5 "reasonable." So the duty is the same, to avoid foreseeable
6 risk of physical harm in an undertaking. The definition of
7 showing what was reasonable care, the word "reasonable" is
8 what's going to change depending on what the person's
9 statutory, constitutional duties, professional station is.

10 I think that's where we are.

11 MR. MAIMON: We agree.

12 THE COURT: Okay. It took a moment for me to get
13 there. But I think I understand where we are. I think we all
14 understand.

15 You're not suggesting, Mr. Ter Molen, that Howard --
16 let's say, Michael Glasgow could declare a state of emergency
17 or had the authority or the statutory authority or any other
18 constitutional authority. He just couldn't do that.

19 His role was at the water treatment plant. He has a
20 different -- you're going to hold him to a different standard
21 than the governor who's got constitutional statutory duties to
22 protect the safety and the welfare of the population.

23 MR. TER MOLEN: I'm not sure it's a different
24 standard in the sense that with respect to what his
25 responsibilities were, he had responsibilities. And we will

1 show as part of our case that he violated those
2 responsibilities.

3 Similarly, we'll show that the former governor had
4 responsibilities and that he did not follow those
5 responsibilities in a number of ways and so on, Your Honor --

6 THE COURT: Correct.

7 MR. TER MOLEN: -- for the 36 different entities that
8 we identified.

9 So in that sense, I agree, Your Honor. And we'll go
10 back and look at what the Court has -- what the Court has
11 ruled and go from there.

12 THE COURT: Okay. All right. I think we've got it.
13 Pardon me.

14 Let's look at the Fifth Amendment. And my first
15 question is: What do any of you know about -- are there nine
16 individuals who have criminal charges outstanding? Is that
17 Mr. Stern?

18 MR. STERN: Yes, Your Honor. There are nine.

19 THE COURT: Okay. And have you gotten any
20 communication from either them or their lawyers as to whether
21 they plan to assert the Fifth?

22 MR. STERN: I mean, I've heard from Mr. Ambrose's
23 attorney both directly and through the Court that his client
24 intends to assert the Fifth. He also mentioned recently that
25 he intended to file a motion to quash, I believe, the subpoena

1 that was served by VNA.

2 We also served a subpoena. And I would assume that
3 if counsel is moving to quash the subpoena that VNA served,
4 they'd also move to quash the one that we served.

5 I've spoken to counsel for Howard Croft. And there's
6 not a definitive -- I've not had anything definitive stated to
7 me that he will, in fact, assert the Fifth. But all
8 indications are that he will.

9 THE COURT: Croft?

10 MR. STERN: Uh-huh.

11 THE COURT: And with Ambrose, all we got was a
12 telephone call from a lawyer saying, "Does my client need to
13 show up?" Answer, "Yes. You've got a valid subpoena. You
14 absolutely must show up, or you're in violation."

15 Same would be true for Ambrose unless the motion to
16 quash is granted, which that's a whole different matter.

17 But what I still don't know from -- and Mr. Ambrose
18 and Mr. Croft both set for depositions.

19 MR. STERN: Yes, Your Honor.

20 THE COURT: Did not assert the Fifth at all during
21 all depositions.

22 MR. STERN: Correct, Your Honor.

23 THE COURT: And to the extent you have subpoenaed
24 cross and Ambrose, do you intend to ask questions that go
25 beyond the questions in the deposition?

1 MR. STERN: No, Your Honor.

2 THE COURT: Okay. Mr. Christian, you're here to
3 discuss this?

4 MR. CHRISTIAN: Yes, Your Honor.

5 THE COURT: Okay. On behalf of VNA, do you intend to
6 ask questions that go beyond the questions that VNA asked at
7 those depositions?

8 MR. CHRISTIAN: I think we may, Your Honor.

9 THE COURT: Okay. And will you be able to articulate
10 to me what areas you'll go into that are not in the deposition
11 and what that relevance would be to the jury?

12 MR. CHRISTIAN: Your Honor, I can't -- excuse me --
13 exhaustively state that for the Court at this point in time.
14 I think we can provide more information about that before
15 these witnesses take the stand.

16 THE COURT: Okay. Mr. Kent, do you intend to ask
17 questions that go beyond the questions that you asked at the
18 deposition?

19 MR. MASON: We would anticipate doing so, Your Honor.

20 THE COURT: Into what areas?

21 Yeah, don't be that close, because then it blasts, I
22 think, into Jeseca's ears.

23 MR. MASON: Thank you, Your Honor.

24 So, yes, we would intend to expect to do so. And as
25 with VNA, cannot predict to you right now what the specific

1 questions would be or topics would be. That will depend in
2 part upon how evidence comes in at the time that Mr. Ambrose
3 would be likely to testify.

4 THE COURT: Okay. Here's the way -- and then correct
5 me if I don't have this right. But with respect to the Fifth
6 Amendment in a civil case by a witness who is a nonparty --
7 although you're now suggesting these individuals are
8 nonparties at fault. So they're still nonparties.

9 Convertino v. United States DOJ teaches that I am to
10 indulge every reasonable presumption against waiver. But
11 Convertino also says that an ordinary witness -- and so I want
12 you to tell me if these are not ordinary witnesses.

13 An ordinary witness is permitted to, quote, "Pick the
14 point beyond which he will not go and refuse to answer any
15 questions about a matter already discussed, even if the facts
16 revealed are already incriminating."

17 But here's what's important. "As long as the answers
18 sought may tend to further incriminate him."

19 So what I will need to do is find out what areas you
20 want to go into with these witnesses that might further
21 incriminate them. And I'll have to make a determination as to
22 whether they can then validly assert the Fifth Amendment
23 privilege against self-incrimination, in which case they
24 become unavailable, and we play their depositions.

25 And then we sort out whether that happens in front of

1 the jury or not and whether there's an adverse inference or
2 not.

3 But I don't even think we need to get to any of this
4 until we know what they're willing to answer and what your
5 questions are that would go beyond the scope of the
6 depositions that would tend to incriminate them in a way that
7 the deposition testimony did not.

8 How do I have that wrong, Mr. Christian?

9 MR. CHRISTIAN: No, Your Honor. I just wanted to
10 clarify that, you know -- what you already stated, that we're
11 talking about beyond the -- further incriminating beyond the
12 scope of the deposition.

13 So there could be a question that was unavailability
14 is question by question. It's not a blanket unavailability.
15 So if we're asking them a question that was covered in the
16 deposition and that they answered, that they're not going to
17 be able to raise the Fifth and not answer that specific
18 question before the jury.

19 THE COURT: Correct.

20 MR. STERN: I didn't understand that.

21 THE COURT: I didn't entirely follow.

22 So what we'll do is for anyone who tries to quash the
23 subpoena, we'll have an ancillary proceeding outside the
24 hearing of the jury where we find out what -- to what extent
25 do they wish to exercise their Fifth Amendment rights. When

1 we find out that, then I'll have each defendant -- well, I'll
2 have all three parties tell me what areas you want to question
3 them that would potentially go beyond the deposition that may
4 tend to further incriminate them.

5 And then if those questions do not further intimidate
6 them, because it's -- then tell me where you live. You know,
7 I don't know. It's just something that doesn't incriminate
8 them, then I'm going to say you don't have the legal right to
9 assert the Fifth, and you're going to answer the questions.

10 But let's say that they can articulate either through
11 counsel that there is some further incrimination, then I would
12 rule that they may assert the Fifth.

13 And in any event, the deposition, I guess, doesn't
14 need to be played if they'll answer -- they'll have to answer
15 all of those questions, unless they can say, "I've lost
16 concentration, and I might incriminate myself," or something
17 that hadn't happened during the deposition. I can't imagine
18 what that would be.

19 Yeah. I cannot imagine granting the motion to quash
20 for people who have sat for depositions relevant to this case.
21 And the depositions were in this case, so they're going to
22 really have to bring some strong law to me about quashing a
23 deposition.

24 I mean, there could have been an illness. There has
25 been a global health crisis. Maybe somebody has lost

1 cognition since -- as a result of COVID. You know, something
2 like that. But I don't know what that would be.

3 MR. STERN: Your Honor, may I just ask a question for
4 some clarity?

5 THE COURT: Yes.

6 MR. STERN: So I understand Your Honor's plan is
7 someone comes in because of a valid subpoena. Outside the
8 presence of the jury, Your Honor seeks to determine what any
9 of the parties are going to ask of the witness to see if there
10 are questions that go beyond the scope of what was included
11 during the deposition.

12 THE COURT: And then I'm going to listen to those
13 questions and make sure they're relevant to the proceeding.
14 Because if the idea is to get the witness up there to force
15 them to take the Fifth, that's gamesmanship that we don't want
16 to -- I don't want to be a part of. I'm not in it for that.

17 But if those additional questions are relevant to the
18 nonparty at fault case or relevant to plaintiff's case in
19 chief or whatever, then I'll certainly figure out whether the
20 answers to those questions would tend to further incriminate
21 the witness. And if they would, they will be allowed to take
22 the Fifth with respect to that.

23 And then I think what we do at that point is I may
24 need further briefing on this. Because I'm not -- the problem
25 is that McKinney doesn't tell us that much. McKinney tells us

1 that in civil cases, parties can comment on a refusal to
2 testify, including a Fifth Amendment refusal.

3 But, Mr. Stern, you brought forth a district court
4 case and otherwise a Second Circuit case that gave me a very
5 -- you weren't confusing, but the cases are confusing about
6 how to apply this test.

7 I don't really understand the test that relates to an
8 adverse inference witness if the witness does not answer the
9 questions. I'm to look at the nature of the relationship
10 between the parties.

11 Okay. Mr. Stern, which parties am I looking at the
12 relationship between?

13 MR. STERN: Typically between the person invoking the
14 Fifth Amendment --

15 THE COURT: Yeah.

16 MR. STERN: -- and the party that is -- that is
17 causing the invocation of the Fifth Amendment to be raise.
18 And so if VNA's counsel is --

19 THE COURT: Well, you're now -- you've subpoenaed
20 Croft and Ambrose.

21 MR. STERN: Correct.

22 THE COURT: So I'm looking at the relationship
23 between you, your clients, and them.

24 MR. STERN: Not at this stage. But at the stage
25 where we'd be seeking an adverse inference.

1 THE COURT: Right. That's what -- that's the part
2 I'm talking about.

3 MR. STERN: Correct.

4 THE COURT: Okay. And so what is their relationship?
5 One had a duty to the other?

6 MR. STERN: Correct.

7 THE COURT: Okay.

8 MR. STERN: But I think it's a little premature to
9 even get to the portion of the adverse inference.

10 THE COURT: Yeah.

11 MR. STERN: Because it very well may be that there
12 are no new questions that get raised. Your Honor finds that
13 there's no plausible reason to assert the Fifth Amendment,
14 because all of the examination is the same or similar enough
15 as to what occurred during the deposition, and the person is
16 ordered to take the stand and they're not able to assert their
17 Fifth.

18 At that point in time, there wouldn't be any adverse
19 inference associated with the assertion of the right to the
20 Fifth Amendment, because there wouldn't be an assertion of
21 Fifth Amendment rights.

22 THE COURT: Yes.

23 MR. STERN: And so it seems that the only way in
24 which we get to the question about adverse inference --

25 THE COURT: Yeah.

1 MR. STERN: -- or even what happens in front of the
2 jury is if and when the Court determines that there's new
3 information that will be elicited based on questions that have
4 been provided by one of the three parties. That that
5 information is seeking to elicit new testimony that would
6 permit the deponent, the witness, to assert his Fifth
7 Amendment right.

8 And then at that point in time, we move to, well,
9 where does that happen, how does that happen, is there an
10 adverse inference.

11 And as of now, there's been nothing presented other
12 than, you know, assertions on the record by counsel that they
13 may, in fact, seek to elicit testimony from the witness.

14 THE COURT: Okay. Do you agree?

15 MR. CHRISTIAN: I agree it's very fact specific, Your
16 Honor. And even with an adverse inference; right? There
17 could be someone invoking the Fifth and the conditions are so
18 broad that it's not possible to make an adverse inference
19 based upon the context.

20 Where at some times, it can be very specific
21 context where --

22 THE COURT: Slow down, Mr. Christian.

23 MR. CHRISTIAN: Yes, Your Honor.

24 There could be a very specific context where the lack
25 of an answer where the silence, it's very probative. And so

1 we think that until we cross that -- you know, until we get to
2 that point, it's not possible to really make a ruling, a broad
3 based ruling on that, Your Honor.

4 THE COURT: Okay. Mr. Kent.

5 MR. KENT: We agree, agree with that, Your Honor.
6 And I do think that this whole concept of adverse inference,
7 because these are nonparties at fault, it's where are you
8 drawing the inference. And is it something that would be an
9 instruction, which is part of what some of these cases talk
10 about --

11 THE COURT: Yeah.

12 MR. KENT: -- or is it simply an argument. And the
13 jury is permitted to draw its own conclusion. There are a lot
14 of different permutations about this that I think go beyond
15 what we can discuss or have discussed so far.

16 THE COURT: I think so, too. So I assume that the
17 motion to quash, if any, will be filed on this Docket
18 17-10164.

19 And we'll just sit tight and wait for it. And we'll
20 set up a hearing at the appropriate time when it's fully
21 briefed and ready for hearing.

22 MR. STERN: I just -- if I could add, Your Honor,
23 that as we -- during the end of each week during our case
24 provide the names of the witnesses for the following week that
25 we intend to call, it's quite possible that we're going to

1 have to build into that particular week, significant time for
2 this issue.

3 Because it appears as though at least two of the
4 parties to the case have some inclination to ask more
5 questions beyond what was included in those questions during
6 the deposition.

7 And not only do we need to see those questions and to
8 hear how the witness would answer them, but we should be privy
9 to seeing those questions in advance, so we can be well
10 prepared when we come into court to try and keep with
11 efficiency and have the opportunity to view those questions
12 when juxtaposed with those that were asked during the
13 extensive, extensive depositions of each of these individuals.

14 So, for instance, Howard Croft was deposed over four
15 or five days. There's multiple volumes for Howard Croft. If
16 we were just to walk in here today and call Mr. Croft to the
17 stand and he were to invoke his Fifth Amendment or indicate to
18 the Court that he was going to.

19 And then LAN and VNA or us come in and say, "Well,
20 Your Honor, we have 60 more questions that we've put
21 together," beyond what was asked in his deposition, I think it
22 would be unreasonable to require the party that may oppose the
23 position to just on the fly make a determination with five
24 volumes of deposition testimonies whether these 60 questions
25 are actually covered by the topics in the deposition.

1 THE COURT: Yeah, so I've been thinking about that.

2 MR. STERN: And the criminal defense attorney who was
3 going to come in and zealously advocate for his client is
4 going to have to be able to prepare for that argument. And
5 all of us should be in the know about what those questions
6 are.

7 It's very difficult to envision a scenario in light
8 of the depth of these depositions -- and Your Honor has seen
9 some of them -- that there are topics beyond the scope of the
10 deposition that actually would come into play here for any
11 reason other than to -- what I believe -- I may be doing the
12 same thing if I were on the other side. But to get these
13 individuals to invoke the Fifth in front of the jury.

14 THE COURT: Okay. Well, I think we will need a
15 process of some sort that you've described.

16 MR. CHRISTIAN: Your Honor, may I respond to that to
17 some extent?

18 THE COURT: Sure.

19 MR. CHRISTIAN: We're not opposing the concept of
20 having some kind of indication of where we're going. But we
21 don't intend and we don't think it's required or should be
22 required that we provide a blueprint to all of our strategy
23 and what we plan to do.

24 THE COURT: No, you don't have to -- but you will --
25 you will have to tell me the areas --

1 MR. CHRISTIAN: Sure.

2 THE COURT: -- there's no way to rule.

3 MR. CHRISTIAN: Sure.

4 THE COURT: I can't rule --

5 MR. CHRISTIAN: Absolutely, Your Honor.

6 THE COURT: -- in pretend imagine world where I don't
7 know what you're asking them. Their lawyers will have to know
8 what you're going to ask them to know whether to assert the
9 Fifth.

10 They can't just assert -- I'm not going to permit
11 them to assert the Fifth if I -- if they don't know what the
12 questions are.

13 MR. CHRISTIAN: Absolutely, Your Honor. And I think
14 that certainly, based on my experience of that of a federal
15 prosecutor, sometimes there are ways you can use --
16 compartmentalize.

17 For example, with governor -- former Governor Snyder,
18 the charge -- charges from April 25 of 2014. If he takes the
19 stand, we may be able to say we intend to ask him some
20 questions about his duties and responsibilities before in 2012
21 or 2013, which quite reasonably might not implicate any of
22 that behavior during the charged period.

23 So sometimes there are ways we can do this
24 strategically so that we cannot have to give every specific
25 question.

1 THE COURT: And we'll find out from him and his
2 lawyer if they need more information on your questions.
3 Because if they say, "Well, 2012, I was at the 4th of July
4 parade. I'm happy to testify about that."

5 But if it turns out 2012, you're going to say, "Isn't
6 it true that you knew you were going to be involved in this
7 situation that would ultimately lead to lead poisoning in the
8 City of Flint?" Well then that would be a different answer.

9 So we're going to have to get a little specific to
10 know if the Fifth is appropriate.

11 MR. CHRISTIAN: We're not looking to hide any smoking
12 guns, Your Honor.

13 THE COURT: Okay. Let me ask Mr. Kent. Given that
14 the witnesses are only potentially going to be unavailable as
15 to certain questions -- but I think if they've answered those
16 questions at the depositions, they're going to need to answer
17 them from the stand.

18 Are you still seeking -- I've got a motion in limine
19 to decide this afternoon or tomorrow where you're seeking to
20 have the full indictments admitted as an exhibit. I assume
21 you're no longer seeking that. Because you've got the witness
22 right here. They're not unavailable or refusing.

23 I mean, they can't refuse to testify as to things
24 they've already testified unless there's something that tends
25 to make it incriminating against them.

1 MR. KENT: Well, Your Honor, I think the part of the
2 argument is the fact that they were under indictment is a
3 relative feature to their credibility, because it would have
4 impinged on their willingness to protect themselves in the
5 form of their testimony at the deposition.

6 And, therefore, that is as part of the justification
7 for being able to bring that information in.

8 THE COURT: Okay.

9 MR. KENT: I don't think that answers the question.

10 THE COURT: I don't think that's the question. The
11 question is the indictment itself. Not the fact that there is
12 an indictment. But the document itself.

13 MR. KENT: Oh.

14 THE COURT: Are you still seeking to have the
15 document itself?

16 MR. KENT: You know, that's a good question. I
17 haven't thought of that aspect.

18 THE COURT: Let me know -- let me know --

19 MR. KENT: Let me discuss that with Mr. Mason and
20 Mr. Erickson.

21 THE COURT: Can you let me know by about 4:00 o'clock
22 today?

23 MR. KENT: Absolutely. Absolutely.

24 MR. STERN: Your Honor, may I just ask one more
25 question?

1 THE COURT: Just a minute. You definitely can. And
2 then I'll tell you an update that my case manager has about
3 the possible motions to be filed. But go ahead.

4 MR. STERN: Okay. If, in fact -- just going to an
5 extreme, imagine a scenario where Howard Croft explains to the
6 Court his intention to invoke the Fifth Amendment, invoke his
7 right to the Fifth.

8 Your Honor makes a legal determination based on the
9 arguments of his counsel and potentially counsel that are here
10 today that he, in fact, must testify and cannot invoke the
11 Fifth as to those topics upon which he's already testified at
12 his deposition.

13 If Mr. Croft gets on the stand, and despite Your
14 Honor's ruling, based on advice of his counsel, still invokes
15 the Fifth Amendment on the stand in front of the jury, how
16 does Your Honor get to that?

17 THE COURT: It's not going to get to that. Because
18 he will know if you've been asked this in the civil deposition
19 in this case, you did not invoke the Fifth then. Asking the
20 same question here, you can't invoke it.

21 So I have in my chambers very important judicial tool
22 that was given to me a couple of years ago, and it's this
23 long. And the size is about as big as my pinky. And I've
24 never had to use it. But I will bring it down here, and I
25 will use the gavel that is as long as my pinky and make sure

1 that that doesn't happen, because it's not permitted.

2 MR. STERN: Understood.

3 THE COURT: I don't know what I would have to do to
4 convince them of that, but that gavel will come with me down
5 here that day.

6 MR. MAIMON: There are circumstances, Your Honor,
7 where people -- people disobey the courts, and the Court has
8 powers of contempt. I guess we're just going to have to see
9 what their lawyers tell them to do. Theoretically they might
10 have rights of appeal. I mean, we'll just have to see, I
11 think.

12 MR. STERN: Yeah, that's another issue. If Your
13 Honor makes that ruling, which is perfectly plausible and
14 appears to conform with the law, their lawyers may not agree,
15 and because this is a fundamental right associated with
16 criminal proceedings, they may seek the opportunity to take
17 that to the Sixth Circuit.

18 THE COURT: They can do that. But we're going to
19 keep going with our case to the extent we have other witnesses
20 while that happens.

21 MR. STERN: Understood.

22 THE COURT: We did hear from an attorney, Bill Swor.

23 MR. STERN: That's the attorney for Mr. Ambrose.

24 THE COURT: For Mr. Ambrose. He contacted the Court
25 -- he's got a case coming up next week for sentencing in a

1 totally different matter.

2 He mentioned regarding our case that a joint motion,
3 perhaps three parties to quash the subpoenas would be filed.
4 But he didn't say when.

5 I find all these ex parte communications --

6 MR. CHRISTIAN: Did he identify which parties, Your
7 Honor?

8 THE COURT: No. We don't ask for further -- once
9 somebody starts an ex parte communication, we don't ask for
10 more information from them.

11 MR. STERN: Good practice, I think.

12 THE COURT: Yeah. And then I love Mr. Swor. He's a
13 good human being. I don't mean to say anything there.

14 But okay. So all we know is we're going to wait for
15 that motion if it's filed -- people often say, "I'm filing a
16 motion," and you never see it.

17 But let's assume that it will be filed. You'll see
18 it on the docket when I see it. I can set a briefing
19 schedule, or you can just follow the local rules. It would be
20 a non-dispositive motion. I think you have 14 days.

21 But if you need more time or want to expedite it, you
22 can let me know. I will be seeing you every day for a while
23 except Fridays. And we'll just sort it out. And so we'll get
24 to the adverse inference and all of that if we need to later.

25 So I think the other thing I was interested in, just

1 to be ready for Monday. Can you tell me who will make the
2 opening for plaintiffs?

3 MR. STERN: That will be me, Judge.

4 THE COURT: And you're still thinking up to about an
5 hour and a half?

6 MR. STERN: Yes, Your Honor.

7 THE COURT: Okay. For VNA?

8 MR. CHRISTIAN: Mr. Stein, Your Honor.

9 THE COURT: And you're thinking still about one hour?

10 MR. CHRISTIAN: Yes, Your Honor.

11 THE COURT: Okay. And for LAN, Mr. Mason will do it?

12 MR. MASON: Yes, Your Honor.

13 THE COURT: And you're thinking you'd like to reserve
14 an hour and a half?

15 MR. MASON: Thank you, Your Honor.

16 THE COURT: Okay. And so I think we're all set for
17 that. The lectern is where it is. And I'm asking that you
18 not move any closer to the first two jurors than that.

19 And as of today, masks are required. And the Eastern
20 District suggests that you remain seated, but I'm permitting
21 you to stand.

22 MR. STERN: And if Your Honor -- if I may ask, if we
23 choose to remain seated for whatever reason, and I'm not
24 suggesting I will, will you at least just tell the jury that
25 these are the rules, and some of the lawyers have made the

1 decision to stand up and others have not?

2 THE COURT: Well, I'm not going to say some of the
3 lawyers are breaking the rules. I'm just going to say I have
4 granted some of the lawyers permission to stand up.

5 MR. STERN: Okay.

6 THE COURT: Yeah.

7 Mr. Mason?

8 MR. MASON: Your Honor, I do have one matter for --
9 that I'd like to have it at sidebar before we leave today.

10 THE COURT: Okay. What we can do -- if it's going to
11 be at sidebar, we can just turn the -- do you want it outside
12 the hearing of other counsel?

13 MR. MASON: No.

14 THE COURT: Okay. Then what we can do is conduct a
15 sidebar, which would require turning off the Zoom. And that's
16 all -- then we can stay right here.

17 MR. MASON: Then we can have it off the record.

18 (Sidebar Conference)

19 MR. MAIMON: We have no objection to the request,
20 Your Honor. And just -- are we done with everything else just
21 so we know where we're at?

22 THE COURT: Okay. We're still on the Zoom. Let's
23 just -- is there anything else today that needs to be on the
24 record?

25 MR. STERN: I just want to be clear that the only two

1 attorneys that I have communicated with to even raise the
2 potential of invoking the Fifth Amendment are attorneys for
3 Ambrose and Croft.

4 MR. CAMPBELL: Your Honor.

5 THE COURT: Okay. Yeah.

6 Mr. Campbell.

7 MR. CAMPBELL: Your Honor, I believe that my office,
8 Alaina Devine, has heard from a lawyer representing
9 Governor Snyder. And he -- there may be -- there was a
10 reference to taking the Fifth.

11 THE COURT: Okay. Well, we will just watch the
12 docket.

13 MR. CAMPBELL: I was just -- I wanted to respond.

14 THE COURT: No. Thank you. Thank you. Good. We'll
15 watch the docket see what happens.

16 Okay. Well, so we will adjourn for today. We'll
17 begin promptly at 9:00 o'clock with the preliminary
18 instructions that I think all of you have already seen. And
19 then we'll move on to opening.

20 I will -- the jurors have given -- been given a
21 one-page sheet from the court that just tells them to let us
22 know if there's any exposures to COVID or a positive COVID
23 test that we should know about. They also have now chambers
24 instead of the jury department's telephone number if there's a
25 car problem or any other issue should come up.

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1 And that's all that has happened since I last saw
2 you.

3 MR. MAIMON: I'm sorry, Your Honor. I do have a
4 question.

5 Does the Court or the court personnel have contact
6 information, whether it's cellphone, email or whatever for
7 each of the jurors in case we all have an emergency, and they
8 have to be contacted?

9 THE COURT: Yes. We don't yet, but we will.

10 MR. MAIMON: Okay. Great. Thank you.

11 THE COURT: Okay. So let's go off the Zoom, which we
12 have now done, and we are also off the record.

13 (Off The Record)

14 (Proceedings Concluded)

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17 CERTIFICATE OF OFFICIAL COURT REPORTER

18 I, Jeseca C. Eddington, Federal Official Court
19 Reporter, do hereby certify the foregoing 59 pages are a true
20 and correct transcript of the above entitled proceedings.

21 /s/ JESECA C. EDDINGTON
22 Jeseca C. Eddington, RDR, RMR, CRR, FCRR

3/4/2022
Date

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